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16 **UNITED STATES DISTRICT COURT**

17 **DISTRICT OF NEVADA**

18 ROBERT ARMIJO,

19 Plaintiff,

20 vs.

21 OZONE NETWORKS, INC. d/b/a OPENSEA, a
New York Corporation; YUGA LABS, LLC d/b/a
22 BORED APE YACHT CLUB, a Delaware limited
liability company; LOOKSRARE; and DOES 1 to
23 50,

24 Defendants.

25 Case No.: 3:22-cv-00112-MMD-CLB

26 **PLAINTIFF'S OBJECTION TO
DEFENDANT OZONE NETWORKS,
INC.'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF MOTION
TO DISMISS AMENDED
COMPLAINT (ECF NO. 73)**

27 Plaintiff Robert Armijo, by and through his counsel, Armstrong Teasdale LLP and Polsinelli
28 LLP, files his Objection to Defendant Ozone Networks, Inc.'s d/b/a OpenSea ("OpenSea") Request for
Judicial Notice in Support of Motion to Dismiss Amended Complaint ("Request"). This Objection is

1 made and based upon the following Memorandum of Points and Authorities, the papers and pleadings
 2 already on file herein, and any argument this Court may allow at the time of the hearing on the Request.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

5 OpenSea’s request that this Court to take judicial notice of OpenSea’s Terms of Service
 6 (“Terms”) is an improper attempt by OpenSea to insert its own version of events into this case and
 7 undermine Mr. Armijo’s well-pleaded First Amended Complaint (“FAC”). Such is improper and
 8 OpenSea’s Request should be denied because “[s]uch undermining of the usual pleading burdens is not
 9 the purpose of judicial notice or the incorporation-by-reference doctrine.” *Khoja v. Orexigen*
 10 *Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

11 In addition, OpenSea’s Request goes beyond testing the sufficiency of Mr. Armijo’s claims and
 12 asks this Court to improperly engage in fact-finding and prematurely determine the outcome of factual
 13 disputes between the parties.

14 For these reasons, OpenSea’s Request for Judicial Notice in Support of Motion to Dismiss the
 15 Amended Complaint must be denied.

II. LEGAL ARGUMENT

17 OpenSea’s Terms are not subject to the incorporation-by-reference doctrine because Mr.
 18 Armijo never once referenced the Terms in his FAC nor do the Terms form the basis of Mr. Armijo’s
 19 claims. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Additionally, although the
 20 Terms may be susceptible to judicial notice under Federal Rule of Evidence 201(b)(2) as a document
 21 that appears on a publicly accessible website, the assertions of fact OpenSea makes regarding the
 22 information contained within the Terms are not judicially noticeable for their truth. *See Khoja*, 899
 23 F.3d at 999.

A. The Terms Should Not be Incorporated by Reference into the First Amended Complaint

26 “Generally, district courts may not consider material outside the pleadings when assessing the
 27 sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.” *Khoja*, 899 F.
 28 3d at 998. The incorporation-by-reference doctrine is an exception to this rule. *Id.* Under the doctrine,

1 “a defendant may seek to incorporate a document into the complaint ‘if the plaintiff refers extensively
 2 to the document or the document forms the basis of the plaintiff’ claim.’” *Id.* at 1002 (quoting *Ritchie*,
 3 342 F.3d at 907). It is undisputed that Mr. Armijo never referenced OpenSea’s Terms—not even in
 4 passing—in his FAC. Thus, this Court must deal with the more difficult issue of whether the Terms
 5 can form the basis of Mr. Armijo’s FAC even though the FAC does not mention the document at all.
 6 *See id.* at 1002.

7 The incorporation-by-reference doctrine is a “narrow exception . . . it is not intended to grant
 8 litigants license to ignore the distinction between motions to dismiss and motions for summary
 9 judgment.” *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 995 (S.D. Cal. 2005) (citation
 10 omitted). In deciding a motion to dismiss, a court should not “generate an evidentiary record and then
 11 weigh evidence.” *In re Network Equip. Techs., Inc. Litig.*, 762 F.Supp. 1359, 1368 (N.D.Cal.1991).

12 OpenSea’s Terms do not form the basis of any claim in Mr. Armijo’s FAC. Mr. Armijo brings
 13 three claims against OpenSea: negligence, negligent supervision and training, and negligent hiring.
 14 None of these claims arise from OpenSea’s Terms or Mr. Armijo’s use of his OpenSea account.

15 OpenSea claims that incorporation of the Terms is permitted because Mr. Armijo’s “claims
 16 each flow from his use of the OpenSea service.” Request at 3. This is not correct. Mr. Armijo was not
 17 subject to OpenSea’s Terms at the time his NFTs were stolen because he was not using OpenSea’s
 18 service when the theft occurred. As OpenSea clearly states in its Motion to Dismiss, Mr. Armijo’s
 19 BAYC NFTs were stolen “by a third-party scammer using a completely different online platform—
 20 Discord—that is not affiliated with OpenSea in any way.” MTD at 1. This is clearly a factual dispute
 21 between the parties. Asking this Court to conclude that the Terms, and the exculpatory clause included
 22 in them, apply to this case goes “beyond testing the sufficiency of the claims and into the realm of
 23 factual disputes.” *Khoja*, 899 F3d at 1006.

24 Additionally, if a document “merely creates a defense to the well-pled allegations in the
 25 complaint,” then that document cannot be said to form the basis of the complaint. Here, OpenSea is
 26 offering the Terms as evidence that the exculpatory clause contained within the Terms is a bar to Mr.
 27 Armijo’s claims. “Submitting documents not mentioned in the complaint to create a defense is nothing
 28 more than another way of disputing the factual allegations in the complaint[.]” *Id.* at 1002. OpenSea

1 cannot use the incorporation doctrine as a tool to short-circuit Mr. Armijo’s well-pleaded complaint.
2 *See id.* at 1003.

3 Accepting OpenSea’s Terms would require this Court to convert OpenSea’s Motion to Dismiss
4 into a motion for summary judgment, which is inappropriate at this stage where no discovery has been
5 conducted regarding any aspect of OpenSea’s Terms (and Mr. Armijo’s purported consent to same).

6 For this and the foregoing reasons, OpenSea’s Request for Judicial Notice must be denied.

7 **B. The Terms Are Not Subject to Judicial Notice.**

8 “Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is ‘not subject
9 to reasonable dispute.’” *Khoja*, 899 F.3d at 999 (citing Fed. R. Evid. 201(b)). Accordingly, “[a] court
10 may take judicial notice of matters of public record without converting a motion to dismiss into a
11 motion for summary judgment,” but “a court cannot take judicial notice of disputed facts contained in
12 such public records.” *Id.* (citations omitted).

13 Here, although this Court may take notice that OpenSea’s Terms simply exist as a matter of
14 public record and can be readily found online, it would not be permissible for this Court to judicially
15 notice the disputed facts contained within the Terms, which is the end goal OpenSea seeks. OpenSea
16 seeks judicial notice of the Terms for the purpose of claiming that the exculpatory clause contained
17 therein applies to Mr. Armijo’s claims. Mr. Armijo denies not only that the Terms apply but also that
18 the exculpatory clause is unenforceable. Thus, at this motion to dismiss stage, this Court has no need
19 to take judicial notice of OpenSea’s Terms.

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III. CONCLUSION

For the foregoing reasons, this Court should deny OpenSea’s Request for Judicial Notice in Support of Motion to Dismiss Amended Complaint.

DATED this 3rd day of October, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of ARMSTRONG TEASDALE LLP, and that the foregoing document:

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